Supreme Court, U.S.
FILED

021805 MAY 29 2003

No. 02-

IN THE

Supreme Court of the United States

JOHN HANYOK,

Petitioner,

v.

KATHLEEN HANYOK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

Whether § 20-124.2 and § 20-124.3 of the Code of Virginia, 1950, as amended, are repugnant to the U.S. Constitution by reason of being overbroad as written, and repugnant as applied in the instant case?

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Mr. John Hanyok respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Commonwealth of Virginia.

OPINIONS BELOW

The Virginia Court of Appeals decision is published at Hanyok v. Hanyok, 2002 VA 544 (VACA, 2002) Record No. 1754-01-4. (App. A) The orders in controversy concerning custody and visitation are contained in the final decree of divorce entered June 8, 2001, by the Circuit Court for the County of Fairfax, Virginia. Excerpts are reprinted as App. B.

STATEMENT OF JURISDICTION

Petitioner timely appealed to the court of last resort, the Supreme Court of Virginia, and was denied review by Order of that court dated November 10, 2002. (App. C) Petitioner's subsequent petition to the Virginia Supreme Court for a rehearing was denied by Order dated February 28, 2003. (App. D) The jurisdiction of the United States Supreme Court now is invoked under 28 U.S.C. § 1257(a).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

CODE OF VIRGINIA § 20-124.2. Court-ordered custody and visitation arrangements, which in pertinent part states:

> A. In any case in which custody or visitation of minor children is at issue, whether in a circuit or district court, the court shall provide prompt adjudication, upon due consideration of all the

facts, of custody and visitation arrangements, including support and maintenance for the children, prior to other considerations arising in the matter. The court may enter an order pending the suit as provided in § *20-103*. The procedures for determining custody and visitation arrangements shall insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members. Mediation shall be used as an alternative to litigation where appropriate. When mediation is used in custody and visitation matters, the goals may include development of a proposal addressing the child's residential schedule and care arrangements, and how disputes between the parents will be handled in the future.

B. In determining custody, the court shall give primary consideration to the best interests of the child. The court shall assure minor children of frequent and continuing contact with both parents, when appropriate, and encourage parents to share in the responsibilities of rearing their children. As between the parents, there shall be no presumption or inference of law in favor of either. The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest. The court may award joint custody or sole custody.

CODE OF VIRGINIA § 20-124.3 Best interests of the child; visitation.

In determining best interests of a child for purposes of determining custody or visitation arrangements including any pendente lite orders pursuant to § *20-103*, the court shall consider the following:

1. The age and physical and mental condition of the child, giving due consideration to the child's changing developmental needs;

2. The age and physical and mental condition of each parent;

3. The relationship existing between each parent and each child, giving due consideration to the positive involvement with the child's life, the ability to accurately assess and meet the emotional, intellectual and physical needs of the child;

4. The needs of the child, giving due consideration to other important relationships of the child, including but not limited to siblings, peers and extended family members;

5. The role which each parent has played and will play in the future, in the upbringing and care of the child;

6. The propensity of each parent to actively support the child's contact and relationship with

the other parent, including whether a parent has unreasonably denied the other parent access to or visitation with the child;

7. The relative willingness and demonstrated ability of each parent to maintain a close and continuing relationship with the child, and the ability of each parent to cooperate in and resolve disputes regarding matters affecting the child;

8. The reasonable preference of the child, if the court deems the child to be of reasonable intelligence, understanding, age and experience to express such a preference;

9. Any history of family abuse as that term is defined in § *16.1-228*; and

10. Such other factors as the court deems necessary and proper to the determination.

The judge shall communicate to the parties the basis of the decision either orally or in writing. (1994, c. 769; 1999, c. 634; 2000, c. 466.)

U.S. Const. Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

REASONS FOR GRANTING THE PETITION

The statutes in controversy do not restrict judicial discretion sufficiently to safeguard against violations of fundamental liberty interests protected and guaranteed by the United States Constitution. As written the Virginia child custody and visitation statutes are repugnant to the U.S. Constitution and inconsistent with the prior decisions of the U.S. Supreme Court. The statutes in controversy are overbroad as written and do not limit judicial discretion to conform with the overarching protections of the parent-child relationships found in the decision of this Court. The result is that application of the relevant Virginia statutes, as in the instant case, results in wholesale violations of constitutionally guaranteed human rights – namely, a parent's freedom and right to associate with his minor children and to participate meaningfully in the raising and upbringing of his children. These rights have been held by the United States Supreme Court to be even more precious than any property rights.

In determining whether or not to grant certiorari the Court need to only consider one threshold question: Whether the "best interests of the child" standard set forth in the Virginia custody statutes on its face, and as construed, may sometimes be applied in derogation of the fundamental, Constitutionally guaranteed liberty interest of parents in maintaining meaningful relationships with their children, absent evidence of a clear and compelling state interest concerning the children's health or safety?

In the instant case appealed from, there is no evidence of record or finding by the Court to justify application of the best interests of the child standard in a manner which results in the massive destruction of the appellant parent's

fundamental liberty interest in maintaining parental consortium with his children. When a well established evidentiary rule lacks sufficient safeguards to prevent application in such a manner that it overrides a constitutionally guaranteed right, the negative costs to the individual appellant and to society are too great for the Court to defer review of the question presented.

STATEMENT OF THE CASE

While entertaining a motion for visitation enforcement, the trial court *sua sponte*, and without identifying any vital or compelling state interest for doing so, imposed draconian limitations on the father's physical contact and relationship with his children, by which the trial court restricted the appellant father's contact with his children to merely "dinner every two weeks." [Record at 1034, 1042, Order dated June 8, 2001; and TR. at 1000-01, transcript of trial judge's bench orders of April 26, 2001]. Petitioner noted his Constitutional objections [preserved in the record at TR 1026] and timely noted his appeal.

The Virginia Court of Appeals upheld the trial court ruling [*Hanyok v. Hanyok*, 2002 VA 544 (VACA, 2002) Record No. 1754-01-4] and then denied a petition for re-hearing *en banc* – with the Virginia Supreme Court acting in like manner, denying both the petition for hearing and petition for reconsideration [17a, 18a]. This petition for writ of certiorari from the state court of last resort follows:

The relevant custody and visitation statutes, set forth in § 20-124.2 and § 20-124.3 of the Code of Virginia (1950, *as amended*) are repugnant to the U.S. Constitution, both on their face and as applied in the instant case. The statutes place

no limitation on the exercise of unbridled judicial discretion, even when that discretion is exercised in direct contravention and derogation of a fundamental liberty interest. The failure of the statutes to limit the unfettered exercise of judicial discretion, even when the "best interests of the child" standard is in conflict with a fundamental liberty interest, renders the statutes overbroad and fatally defective.

Petitioner argues that these same statutes violate the Constitutional rights of both the father and the children to have their most important relationships afforded the highest levels of Constitutional protection. Absent evidence of a compelling state interest (such as a showing of abuse or neglect), the "best interests of the child" standard may never be applied in a manner grossly inconsistent with a parent's fundamental liberty interest in maintaining consortium with their children. Yet the instant case demonstrates both the fatally flawed, unconstitutional construction of the Virginia custody statutes both on their face and in their manner of application.

As applied in the inferior courts, the petitioner-father's parental rights were unconstitutionally restricted to a point just short of a *de facto* termination of parental rights, without any showing whatsoever of a compelling state interest which could justify such extraordinary limitations on petitioner-father John Hanyok's association with his children, Ryan and Daniel. Arguing the case from an evidentiary standpoint alone, it is virtually impossible to see how visitation rights consisting merely of "dinner every two weeks" with the children – meets a satisfactory definition of "a meaningful relationship" within the confines of the Virginia statutes (although one cannot help but contemplate such a query) As a matter of constitutional law, however, the issue before

this court is whether these statutes permit exercise of unfettered judicial discretion to a degree which provides no protection for the primacy of the parent-child relationship.

A set of statutory guidelines, more particularly statutes entitled "The Best Interests of the Child," that are tempered with opt-out clauses such as "as appropriate" or "as the court deems" or "if the court deems" as evidenced throughout § 20-124.2 and § 20-124.3 of the Code of Virginia, cannot even be remotely considered constitutional on the face, let alone considered to be constitutional in the administration of the same. As one esteemed Supreme Court Justice said upon his return from Germany after World War II, "Total unanimity of opinion leads to total unanimity in the graveyard." In like manner, total discretionary authority in the court will lead to total destruction of the Rule of Law.

Equally repugnant is the idea that any "Best Interests of the Child" laws could remotely be considered to be in the best interests of the child if they result in an outcome that essentially terminates or abrogates a child's relationship with a fit and loving parent – and in the instant case, an exceptional parent – according to the record.

Moreover, when no party has moved the Court to restrict a parent's relationship with the children – and the Court, of its own volition – decides to restrict that relationship, according to law, it can only be a matter of "vital and compelling state interest" by which the judge makes his ruling. Yet, no vital or compelling state interest was identified other than the fact that the Virginia Court of Appeals asserted that such a ruling was allowable under the existing statutes.

"There is no doubt that constitutional principles must be strictly observed and rigorously applied in cases involving parent-child relationships, because these intimate relationships are constitutionally protected." *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972). Following *Yoder* and its progeny, virtually all state courts recognize the underlying strength of parental rights, as articulated for example by a state court in *Doe v. Irwin*, 441 F. Supp. 1247 (D.C. Michigan) (1985):

> The rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by this amendment (First) and Amendments 5, 9, and 14.

Narrow tailoring is required when fundamental rights are involved. Thus, the state must show adverse impact upon the child before restricting a parent from the family dynamic. "The right of a parent not to be deprived of parental rights without a showing of unfitness, abandonment or substantial neglect is so fundamental and basic as to rank among the rights contained in this Amendment (Ninth) and Utah's Constitution, Article 1 § 1." *In re U.P.*, 648 P.2d 1364; Utah (1982). Under the precedent now set by the rulings in the instant case, Virginia's statutes clearly do not require this narrow tailoring, rendering the statutes unconstitutional.

Moreover, in the instant case, not only was there a lack of unfitness, abandonment, or neglect – the evidence shows that the father was an exceptional father, even according to

the mother. What constitutional statute would allow an exceptional father to have his parental rights all but completely terminated? The existing statutes in questions cannot be squared against the Constitutional protections afforded all citizens of the United States. "No bond is more precious and none should be more zealously protected by the law as the bond between parent and child." *Carson v. Elrod*, 411 F. Supp. 645, 649; DC E.D. VA (1976).

The Due Process Clause of the Fourteenth Amendment requires that severance in the parent-child relationship caused by the state occur only with rigorous protections for individual liberty interests at stake. *Bell v. City of Milwaukee*, 746 F.2d 1205; U.S. Ct. App. 7th Cir. WI (1984).

Even going beyond the right of a parent and child to have their core relationship maintained, the U.S. Supreme Court has held that "freedom of choice in matters of family life is a fundamental liberty interest" protected by the U.S. Constitution through vigorous application of the protections of the Fourteenth Amendment's rights of due process. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). One of the liberties recognized within the context of freedom of choice in family matters is the right of the parent and children to form, maintain, shape, and cultivate their ongoing relationships. *Quilloin v. Walcott*, 434 U.S. 246 (1978). This fundamental liberty interest, which the Court variously refers to as the right of parental autonomy or the right of family integrity, is not diminished because the nuclear family has been fractured by divorce, separation, or if the parents never married. *Lehr v. Robinson*, 463 U.S. 248, 261-62 (1983); *See Caban v. Mohammed*, 441 U.S. 380 (1979). In emphasizing the importance of the fundamental liberty

interests at issue here, the Supreme Court has opined that a parent's right to the "companionship, care, custody and management of his or her children" is an interest "far more precious" than any property right. *May v. Anderson*, 345 U.S. 528, 533 (1952).

Once a right has been determined to constitute a fundamental liberty interest, the government must be extraordinarily circumspect in taking any action to impair or diminish that interest. A visitation order by nature impugns the fundamental liberty interest enjoyed by one parent in the care, nurturance, and upbringing of his or her children. Once this happens, the ordinary level of judicial review of state actions, the rational basis test, is insufficient for evaluating the legitimacy of the state action. Instead, the judicial body reviewing the state action (whether by an executive agency or by a trial court) is required to utilize the most exacting standard of review, the strict scrutiny test. That standard is nowhere to be found in the instant case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION OF THE COURT OF APPEALS OF VIRGINIA DATED AUGUST 13, 2002

COURT OF APPEALS OF VIRGINIA

Present: Judges Benton, Bumgardner and Agee
Argued at Alexandria, Virginia

Record No. 1754-01-4

JOHN HANYOK

v.

KATHLEEN HANYOK

MEMORANDUM OPINION* BY
JUDGE JAMES W. BENTON, JR.
AUGUST 13, 2002

FROM THE CIRCUIT COURT OF FAIRFAX COUNTY
M. Langhorne Keith, Judge

* * *

John Hanyok appeals from a final decree of divorce and raises thirty issues challenging child custody, visitation, equitable distribution, child support, spousal support, and attorney fees. We affirm the decree, and we grant the wife's request for attorney's fees related to this appeal.

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* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

Appendix A

I.

Kathleen and John Hanyok married in 1975. The husband filed a bill of complaint for divorce in 1998, and the wife filed a cross-bill of complaint. The parties have three children: a daughter, who is over the age of majority, and two sons who were minors at the time of the final decree.

In a *pendente lite* consent order, the parties agreed that the wife would have exclusive use of the marital residence, that they would have joint legal custody of their sons, that the sons' primary residence would be with the wife, that the husband would have visitation every other weekend and one day a week, that both parties would consult a mental health expert for purposes of determining a visitation schedule, and that the husband would refrain from contacting the wife. Various other consent orders were entered resolving disputes between the parties. A second *pendente lite* order required the husband to pay child support and spousal support, and it granted other relief.

After a hearing, the commissioner in chancery recommended a divorce on the ground the parties had lived "separate and apart . . . in excess of one year." The husband filed a motion to review, modify, and vacate provisions of the *pendente lite* orders requesting the judge to order psychological and physical examination for the wife, to hold the wife in contempt for "intentional[ly] withholding visitation," and for other relief. The trial judge held an evidentiary hearing and issued a letter opinion. Following various motions and hearings, the judge entered a final decree of divorce.

Appendix A

II. Child Custody and Visitation

The husband contends the trial judge erred in failing to award him primary care of his children and in failing to respond to his various concerns about visitation. He also contends the judge's order violates his constitutional rights to parent his children.

When the United States Supreme Court has reviewed constitutional challenges to family matters, "the Court has emphasized [that] the paramount interest [is] in the welfare of children." *Lehr v. Robertson*, 463 U.S. 248, 257 (1983). Likewise, the "established . . . rule in Virginia [is] that in custody . . . cases the welfare of the child is of paramount concern and takes precedence over the rights of parents." *Malpass v. Morgan*, 213 Va. 393, 399-400, 192 S.E.2d 794, 799 (1972). Consistent with these rules, our statutes contain factors for determining a child's best interest in custody and visitation cases. *See* Code §§ 20-124.2 and 20-124.3. In applying those statutes, we have held as follows:

> Although the trial court must examine all factors set out in Code § 20-124.3, "it is not 'required to quantify or elaborate exactly what weight or consideration it has given to each of the statutory factors.'" As long as evidence in the record supports the trial [judge's] ruling and the trial [judge] has not abused [his] discretion, [his] ruling must be affirmed on appeal.

Brown v. Brown, 30 Va. App. 532, 538, 518 S.E.2d 336, 338 (1999) (citations omitted).

Appendix A

The evidence indicates that a *pendente lite* order gave the husband visitation every other weekend and one day a week. The husband testified that those arrangements did not work out because the wife was interfering in his efforts to see his sons. He testified that after the arbitrator's report specified visitations, he attempted to see his sons, but they would not go with him. He also testified that the wife misled the sons to believe that he had stolen their money and made other allegations.

Although the husband testified the wife was interfering with his efforts to visit the sons, the wife disputed those claims and testified she encouraged the teenage sons to see their father and "wanted them to continue having a relationship with their father and his family." She testified that after doing so she later "backed out because it really seemed to be between [the husband] and the boys." To facilitate the meetings, she would leave when it was time for the scheduled visitation. She testified, however, that the sons were angry with their father because he sometimes failed to appear for visitations and was tardy.

The trial judge met with the teenage sons in his chambers to hear their concerns. Explaining his impression of the meeting, the judge found that "it's just an extremely difficult situation. They are estranged from their father. And I don't think the court ordering practically adults into a visitation schedule is going to help the situation at all." The judge also found that the boys "wouldn't even agree to have dinner every two weeks" and that "they say that they don't want anything to do with their father."

Appendix A

"When the court hears the evidence *ore tenus*, its findings are entitled to the weight accorded a jury verdict, and they will not be disturbed on appeal unless they are plainly wrong or without evidence to support them." *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986). Upon considering testimony of the mother, the father, and the teenage sons, the judge ruled that the continued relationship between the husband and the sons "[was] going to be up to the father and the boys. And I can at least take a stab at it by ordering a dinner every two weeks." In view of the evidence in the record, we cannot say the judge erred when he ordered a visitation schedule, which requires the sons to attend "a dinner every two weeks with review of the visitation in six months." In addition, upon considering the wife's testimony and the findings made by the trial judge following his interview and consideration of the evidence, we hold that the trial judge did not err in refusing to order the wife to undergo an evaluation or to order counseling or a monitor. Moreover, no evidence supports a claim that the husband's constitutional rights were violated. Credible evidence in the record supports the trial judge's custody order and visitation schedule.

III. Equitable Distribution

In reviewing the husband's challenges to the trial judge's findings of fact, we are governed by the following standards:

> On appeal, the trial [judge's] findings must be accorded great deference. "In determining whether credible evidence exists, the appellate court does not retry the facts, reweigh the

> preponderance of the evidence, or make its own determination of the credibility of witnesses." "We will not disturb the trial [judge's] decision . . . unless it is 'plainly wrong or without evidence in the record to support it.'"

Moreno v. Moreno, 24 Va. App. 190, 195, 480 S.E.2d 792, 795 (1997) (citations omitted). The record contains credible evidence supporting each of the trial judge's findings.

1. Valuation Date

The husband contends the trial judge used an improper date to value the property. He argues the trial judge erred by not accepting as an alternative valuation date the date the wife moved out of their bedroom.

In pertinent part, Code § 20-107.3(A) provides as follows:

> The court shall determine the value of any such property as of the date of the evidentiary hearing on the evaluation issue. Upon motion of either party made no less than twenty-one days before the evidentiary hearing the court may, for good cause shown, in order to attain the ends of justice, order that a different valuation date be used.

The husband makes the bare assertion that the wife ceased to contribute to the marriage when she moved from the bedroom and that this was the proper date to valuate the property. We hold the judge did not err in refusing to value

the parties' property as of the date on which the husband alleged the wife moved from the bedroom.

2. Classification of Property

Asserting that "[p]roperty inherited during marriage must be maintained as separate property in order to retain its character as separate property," the husband argues that any inheritance funds the wife used to improve the marital home were transmuted into marital property.

Code § 20-107.3(A)(3)(d) provides, in pertinent part as follows:

> When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.

The husband's witness testified he had reviewed various bank statements and "was not able to trace each of the separate deposits into [the wife's] account." His testimony, however, was not dispositive because the wife testified that these funds were used toward the home. Assessing the evidence, the judge found that the wife adequately traced

her separate contribution to the home. We will not reweigh the evidence on appeal. The wife's testimony was credible and supports the judge's finding.

The husband challenges the judge's calculation of the wife's separate contribution and marital contribution. The wife's testimony and exhibit plainly supported the judge's findings. In view of the conflicting testimony, we cannot say the judge erred when he accepted the wife's evidence and ruled that the marital share of the property at Cabells Mill Drive was $122,334, as opposed to $126,632 as the husband contends. The trial judge found that the value of the property less costs of sale and less a $83,000 lien amounted to $214,620. Of that value, the judge found that the wife adequately traced $37,511 of separate contribution to the house and that the marital contribution was $50,437. The judge therefore adjusted the wife's separate equity at 43% and the marital equity at 57%. *See Moran v. Moran*, 29 Va. App. 408, 414, 512 S.E.2d 834, 836-37 (1999) (holding property was properly classified as marital and separate property). Code § 20-107.3(A)(1) provides, in pertinent part, that "[t]he increase in value of separate property during the marriage is separate property, unless marital property or the personal efforts of either party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions." *See also Smoot v. Smoot*, 233 Va. 435, 439, 357 S.E.2d 728, 730 (1987). Applying these principles, we hold that the judge did not err in his calculations.

The trial judge also did not err in valuing the personal property. The trial judge valued the household goods in the

husband's possession at $5,128 and those in the wife's possession at $6,821. An appraiser who testified on the husband's behalf assessed the values, and the wife testified about the value of certain goods each party had. The trial judge resolved the conflicts and was not required to accept in total either party's evidence. Hence no error appears from the record.

The judge also did not err in determining the value of the Neon automobile. The wife's evidence indicated the value of the vehicle was $1,500. The trial judge did not err in accepting that valuation as credible.

The record does not indicate the trial judge erred concerning the rental property. Although the husband contends the trial judge erred by not crediting rental payments made by him per court order, this argument was not preserved in the court below.

The evidence also supports the trial judge's finding concerning the Prudential and GPM life insurance policies. An exhibit in the record lists the value of those policies as $6,300. Moreover, when the wife's attorney asked the husband whether the cash value of those policies was $6,300, the husband replied, "I believe so."

3. Division of Marital Property

The husband contends the trial judge improperly awarded the wife 50% of the marital property, erred by not selling all of the marital property, and erred by awarding the wife the primary residence. The husband testified that his monetary

contribution was in excess of $1,062,000 during the marriage, while the wife's was approximately $177,000. He contends, therefore, that he should have been awarded a larger portion of the marital property. The husband also expressed his desire that the wife have the Dale City residence which is closer to her work and offered to pay off the $7,000 mortgage on that property. He wanted to reside in the marital home to parent his sons.

In addition to the wife's testimony, a witness who had been a neighbor of the parties for over fifteen years, testified about the wife's involvement in the lives and activities of the children. She testified that the wife was "the predominant person in the home" and that the wife "was always at the school functions, the graduations from the kids, the choral presentations, the plays, and that kind of thing." In contrast, she testified that "[i]t was very rare that [the husband] was able to make those events."

Upon considering the factors in Code § 20-107.3(E), the trial judge determined that the marital property should be equally divided. The judge specifically noted the twenty-five year duration of the marriage and the monetary and nonmonetary contributions of the parties. The record supports the trial judge's findings.

We have held that we will not reverse an equitable distribution award on appeal "unless it appears from the record that the chancellor has abused his discretion, that he has not considered or misapplied one of the statutory mandates, or that the evidence fails to support the findings of fact underlying his resolution of the conflict of equities."

Hart v. Hart, 27 Va. App. 46, 53, 497 S.E.2d 496, 499 (1998). The husband points to no factor that the trial judge failed to consider. Moreover, the record indicates no error. Hence, we hold that the judge did not err in dividing the marital property equally and permitting the wife, who had physical custody of the children, to remain in the primary residence.

IV. Child Support

Although the husband estimated his income in 2001 would be $97,000, the evidence proved his income was $105,490 in 1998, $110,966 in 1999, and $132,566 in 2000. He testified that his salary is $77,000, that he also receives commission depending on his performance, and that he possibly could earn $110,000 in 2001. The evidence did not show the husband had changed careers or employers. We hold that the trial judge did not err when he determined the husband's income was $107,983 by averaging the husband's salary in 1998 and 1999.

The husband also contends the judge erred by failing to impute income to the wife in calculating child support. Code § 20-108.2 provides that "[t]here shall be a rebuttable presumption . . . that the amount of the award which would result from the application of the guidelines . . . is the correct amount of child support to be awarded." A party may rebut this presumption by showing that income should be imputed to a party "who is voluntarily unemployed or voluntarily under-employed." Code § 20-108.1.

The record contains no evidence that income should be imputed to the wife. Although the husband attempted to

testify as to job opportunities available in the wife's field, the judge excluded the evidence because the husband did not qualify as an expert. The judge also determined that the husband's testimony concerning postings on the Internet of job opportunities was inadmissible hearsay.

No evidence proved the wife had been offered a higher paying position or that it would be more economical for her to obtain a different position. The wife testified that although she worked a full time schedule, she could only bill a portion of the hours she actually worked. She testified that she "definitely put[s] in a 40-hour week, but . . . can only bill for those hours that I' m providing direct intervention." The trial judge accepted her testimony as credible and found that it would be improper to impute income. The record supports the findings.

V. Spousal Support

A trial judge must consider the factors in Code § 20-107.1 in fashioning an award of spousal support. "Where the [judge] has given due consideration to each of these factors, as shown by the evidence, his determination as to spousal support will not be disturbed." *Thomasson v. Thomasson*, 225 Va. 394, 398, 302 S.E.2d 63, 66 (1983). "Whether and how much spousal support will be awarded is a matter of discretion for the trial court." *Barker v. Barker*, 27 Va. App. 519, 527, 500 S.E.2d 240, 244 (1998).

Although the husband contends the trial judge erred in awarding the wife $1,200 per month spousal support, the record contains sufficient evidence concerning the relevant

factors to support the award. In particular, evidence was presented concerning the parties' needs and standard of living. Based on the evidence in the record, the judge did not err in awarding spousal support.

The husband additionally contends the judge should have imputed income to the wife in determining spousal support. Although it is true that "[t]he party seeking spousal support must earn as much as he or she reasonably can to reduce the amount of the support needed," *Konefal v. Konefal*, 18 Va. App. 612, 614, 446 S.E.2d 153, 154 (1994) (citation omitted), as we held in the prior section, the husband presented no evidence that the wife was foregoing more gainful employment. Accordingly, the record supports the judge's award.

VI. Attorney's Fees

"The amount of counsel fees . . . [is] a matter for the exercise of the sound discretion of the trial court. In the absence of an abuse of this discretion, such an award will not be disturbed." *Ingram v. Ingram*, 217 Va. 27, 29, 225 S.E.2d 362, 364 (1976). The judge's award to the wife of $5,000 in attorney's fees was not unfair in light of the equities of the parties as determined by the judge. We hold therefore that the trial judge did not abuse his discretion.

Furthermore, we agree that an award of attorney's fees, as requested by the wife, is warranted for this appeal. We therefore remand to the trial judge for determination of reasonable attorney's fees in connection with this appeal to be awarded to the wife.

Appendix A

VII.

Upon our review of each of the thirty issues raised by the husband, we conclude that the trial judge did not err.

Accordingly, we affirm the judgment and remand for determination of attorney's fees to the wife.

Affirmed and remanded.

APPENDIX B — EXCERPTS FROM THE FINAL DECREE OF DIVORCE OF THE CIRCUIT COURT OF FAIRFAX COUNTY DATED JUNE 8, 2001

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In Chancery No. 156459

JOHN HANYOK,

Complainant/Cross-Defendant,

v.

KATHLEEN HANYOK,

Defendant/Cross-Complainant.

FINAL DECREE OF DIVORCE

* * *

9. That there is to be visitation with the children at least for the time being to a dinner every two weeks with a review of the visitation in six months; and

* * *

Appendix B

AND THIS DECREE IS FINAL

ENTERED this 8 day of June, 2001.

s/ M. Langhorne Keith
M. LANGHORNE KEITH, JUDGE

APPENDIX C — ORDER OF THE SUPREME COURT OF VIRGINIA DISMISSING PETITION FOR APPEAL DATED NOVEMBER 25, 2002

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 25th day of November, 2002

Record No. 022339
Court of Appeals No. 1754-01-4

John Hanyok,

Appellant,

against

Kathleen Hanyok,

Appellee.

From the Court of Appeals of Virginia

Finding that the decision of the Court of Appeals does not involve (1) a substantial constitutional question as a determinative issue, or (2) matters of significant precedential value, the Court dismisses the petition for appeal filed in the above-styled case. Code § 17.1-410(A) (3) and (B).

A Copy,
Teste:
David B. Beach, Clerk

By: s/ [illegible]

APPENDIX D — ORDER OF THE SUPREME COURT OF VIRGINIA DENYING PETITION FOR REHEARING DATED FEBRUARY 28, 2003

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 28th day of February, 2003.

Record No. 022339
Court of Appeals No. 1754-01-4

John Hanyok,

Appellant,

against

Kathleen Hanyok,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 25th day of November, 2002 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy
Teste:

s/ [illegible]
Clerk